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David J. Bayer

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EXAMINER

SAIDI, AZADEH

ART UNIT

PAPER NUMBER

3735

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PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/820,492	<b>Applicant(s)</b> BAYER ET AL.	
	<b>Examiner</b> Anita Saidi	<b>Art Unit</b> 3735	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on October 12, 2007.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1,4-13,15,16,23-55 and 57-61 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,4-13,15,16,23-55 and 57-61 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 08 April 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |                                                                                      |                                                                   |
|--------------------------------------------------------------------------------------|-------------------------------------------------------------------|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____                                                          | 6) <input type="checkbox"/> Other: _____                          |

### **DETAILED ACTION**

1. This office action is responsive to applicant's amendments filed on October 12, 2007. The examiner acknowledges the cancellation of claims 2-3, 14, 17-22, 26 and 56 and the addition of claim 61. Claims 1, 4, 13, 23, 25, 36 and 54 are amended. Currently claims 1, 4-13, 15-16, 23-55 and 57-61 are pending.

### ***Response to Arguments***

2. Applicant's arguments, see page 18, line 4, filed on October 12, 2007, with respect to the rejection(s) of claim(s) 1 under 35 USC 102(b) over US 6,468,222 to Mault and US 4,656,008 to Gump have been fully considered and are persuasive. Therefore, the rejection has been withdrawn. However, upon further consideration, a new ground(s) of rejection is made in view of different interpretation of the previously applied reference(s) and newly found prior art reference(s).

3. Applicant's arguments, see page 20, line 23 filed on October 12, 2007, with respect to the rejection(s) of claim(s) 13 under 35 USC 102(b) over US 4,274,425 to Lutz have been fully considered and are persuasive. Therefore, the rejection has been withdrawn. However, upon further consideration, a new ground(s) of rejection is made in view of different interpretation of the previously applied reference(s) and newly found prior art reference(s).

4. Applicant's arguments, see page 21, line , filed on October 12, 2007, with respect to the rejection(s) of claim(s) 36 under 35 USC 102(b) over Mault and Gump have been fully considered and are persuasive. Therefore, the rejection has been withdrawn.

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However, upon further consideration, a new ground(s) of rejection is made in view of different interpretation of the previously applied reference(s) and newly found prior art reference(s).

5. Applicant's arguments, see page 23, line 5, filed on October 12, 2007, with respect to the rejection(s) of claim(s) 54 under 35 USC 103 over Lutz and Wolf have been fully considered and are persuasive. Therefore, the rejection has been withdrawn. However, upon further consideration, a new ground(s) of rejection is made in view of different interpretation of the previously applied reference(s) and newly found prior art reference(s).

6. Applicant's arguments filed on October 12, 2007 have been fully considered but they are not persuasive. See the rejection of Claim 23 below. Applicant argues that the Mault reference does not teach a stop member for positively locating the mouthpiece, however, Mault clearly discloses a stop member for positively locating the mouthpiece (the ring around the connection 332) and the mouthpiece is placed against the stop in a testing position (Fig. 21).

7. Applicant's arguments filed on October 12, 2007 have been fully considered but they are not persuasive. See the rejection of Claim 36 below. Applicant argues that neither of the prior art references teaches a mouthpiece which is configured obliquely from the monitoring device. Examiner believes that this feature does not add any patentably distinct weight to the claimed invention, and is simply a matter of design choice.

8. Applicant's arguments filed on October 12, 2007 have been fully considered but they are not persuasive. See the rejection of Claim 47 below. Applicant argues that the D or V-shaped cross sections are important in the fact that it helps the subject how to orient the mouthpiece during insertion, the Hirsch reference teaches a similar mouthpiece, which as explained by the applicant, comprises the same features, such as the subject can have a feel for how to place the mouthpiece on the monitoring device.

***Claim Rejections - 35 USC § 112***

9. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

10. Claim 46 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 46 recites the limitations "said mouthpiece body" in line 2 and "said body" in lines 3 and 5. There is insufficient antecedent basis for these limitations in the claim.

***Claim Rejections - 35 USC § 102***

15. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

16. Claims 13 and 15-16 are rejected under 35 U.S.C. 102(b) as being anticipated by US 4,274,425 to Lutz et al (Hereinafter "Lutz").

In reference to claims 13, 15-16:

Lutz teaches a device for measuring redox gases, such as alcohol, in a person's breath, which comprises a disposable mouthpiece (Abstract). The mouthpiece (5), comprises a first end (39) and a second end (27), with the second end is closed and is rounded to facilitate engagement with the breath testing device (Fig. 1). The mouthpiece further comprises at least one port for channeling air blown into the mouthpiece (through 39 and 15) into the breath testing device. The mouthpiece is made of plastic material (Col. 1, lines 48-50). The mouthpiece snaps into engagement with the breath testing device (snap members 23, 25, 33 and 35 and Col. 3, lines 40-52). A stop member (the bend at 41) extending radially outward from the body to facilitate positioning a subject's mouth during breath testing (Fig. 1).

17. Claims 23-24, 26-32, 34, 36-42, 44-45, 47-48, 50-53 and 61 are rejected under 35 U.S.C. 102(b) as being anticipated by US 6,468,222 to Mault et al (Hereinafter "Mault").

In reference to claims 23-24 and 29-30:

Mault teaches a calorimeter for measuring the metabolic rate of a subject, which comprises a housing (10), which comprises a base (12), a display (18), and a mouthpiece interface (14 or 20). The base can be gripped by an operator during testing, and the display is oriented with respect to the housing to be in line with an operator's direct line of view while gripping the base (Fig. 1). The mouthpiece is removably coupled to the mouthpiece interface (346 in Fig. 23 and 326 in Fig. 21). The mouthpiece comprises at least one substantially planar surface (Fig. 23). The mouthpiece interface includes a stop for positively locating the mouthpiece (the ring around the connection 332). The mouthpiece is placed against the stop in a testing position (Fig. 21). The housing further comprises at least one actuator for controlling operation of the breath tester (16). The mouthpiece is further oriented with respect to the housing such that discard breath discharged from the housing is not directed at the operator (Fig. 4 and output port G, or 72).

In reference to claims 26-28, 36-37, 40-42 and 61:

The housing assembly comprises a first sidewall (the side towards 74) and an opposite second sidewall (26) coupled together at a front edge (the edge towards element 34) and a back edge (the connection edge on the opposite side). The first and second sidewalls are extended radially between a top surface (the side towards 68) and a bottom surface (the side towards 70). The display is located along the front edge, and the mouthpiece interface is located along the top

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surface (Figs. 3 and 4). The mouthpiece interface is further oriented obliquely (design choice MPEP 2144) from the top surface and is substantially parallel to the top surface (Figs. 21 and 23). The housing further comprises a mouthpiece interface sized to receive a mouthpiece in sealing contact therein (the inlet port 346 creates an airtight seal). The mouthpiece comprises one of a tube and a funnel (Fig. 23). The mouthpiece extends obliquely (design choice MPEP 2144) from the top surface and substantially parallel to the top surface (Figs. 21 and 24 of Mault).

In reference to claims 31-32 and 38-39:

The housing comprises one actuator (16) for controlling illumination of a portion of the housing. A light source is used for illuminating at least a portion of the interface, where an opening on the housing will pass light from an interior to an exterior of the housing (Col. 3, line 59-Col. 4, line 5).

In reference to claims 34 and 45:

A portion of the body has a selected cross-sectional shape being one of a D-shaped cross-sectional shape and a V-shaped cross-sectional shape (Fig. 23 the difference between the v-shape and d-shape cross sectional shape of the mouthpiece does not add patentable weight to the claimed invention, and it's merely a design choice, MPEP 2144).



In reference to claim 44:

A portion of the mouthpiece has a cross-sectional shape that is substantially similar to at least portion of a cross-sectional shape defined by the mouthpiece interface, such that the mouthpiece interface facilitates positioning the mouthpiece in proper alignment with respect to the housing (the inlet port 346 and the narrower side of the funnel 344 have the same cross section).

In reference to claim 47:

Mault teaches a calorimeter for measuring the metabolic rate of a subject, which comprises a mouthpiece (14 or 20). The mouthpiece comprises a first end (seal 354), a second end (the end attached to 346), and a body extending there between (344). A portion of the body has a selected cross-sectional shape being one of a D-shaped cross-sectional shape and a V-shaped cross-sectional shape (Fig. 23 the difference between the v-shape and d-shape cross sectional shape of the mouthpiece does not add patentable weight to the claimed invention, and it's merely a design choice, MPEP 2144). The body further comprises a passageway extending through the body from the first end towards the second end (Fig. 24), where the passageway channels the air blown into the mouthpiece into the breath testing device (Fig. 4).

In reference to claims 48 and 50-53:

The body further comprises an external surface (the outside surface of 344), an internal surface (internal surface of 344), and at least one inlet port (30) extending therebetween. The inlet port channels air from the passageway into the breath testing device (Fig. 4). The mouthpiece comprises a substantially planar surface (Fig. 24). One of the first end and the second end is rounded to facilitate engagement with the breath testing device (the connection 346 to the second end of the mouthpiece).

### ***Claim Rejections - 35 USC § 103***

18. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

19. Claims 1, 4-10 and 12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mault in view of US 6,319,199 to Sheehan et al (Hereinafter "Sheehan").

#### In reference to claims 1, 7, 9 and 12:

Mault teaches:

A calorimeter for measuring the metabolic rate of a subject, which comprises a symmetrical housing and base (12 of Mault) to be gripped by an operator, which has a front edge (the same side

display 18 of Mault) and an opposite back edge (the same side as mouthpiece 14). The device further comprises a display (18 of Mault) oriented on one of the edges and aligned with an operator's direct line of view while gripping the base (Fig. 1 of Mault). A mouthpiece interface (32 of Mault) is used for interfacing with a removable mouthpiece, wherein the mouthpiece interface is oriented with respect to the base such that when the operator stands in front of the subject and a subject blows into the mouthpiece the display is not in the direct line of view of the subject (Fig. 1 of Mault). An actuator including a manual sample button (16 of Mault) is located on the edge adjacent to the display. The discard breath is not directed at the operator (port G, and 72 of Mault).

However, Mault fails to teach that:

The actuator is located on the edge of the base opposite the display.

Sheehan teaches:

A portable data collection device for diagnosing and data collection (Abstract of Sheehan), comprising actuator buttons placed on the same (216 of Sheehan) or opposite (218 of Sheehan) side of the display (220 of Sheehan). The input dials (216 and 218 of Sheehan), control the operation of the device.

Therefore it would have been obvious to one having ordinary skill in the art at the time the applicant's invention was made to have placed the operating actuator buttons on the gripping handle of the device, similar to the teachings of Sheehan, in the Calorimeter of Mault, in order to give the subject more convenient, while operating the device.

In reference to claim 4:

The housing assembly comprises a first sidewall (the side towards 74 of Mault) and an opposite second sidewall (26 of Mault) coupled together at a front edge (the edge towards element 34 of Mault) and a back edge (the connection edge on the opposite side). The first and second sidewalls are extended radially between a top surface (the side towards 68 of Mault) and a bottom surface (the side towards 70 of Mault). The display is located along the front edge, and the mouthpiece interface is located along the top surface (Figs. 3 and 4 of Mault).

In reference to claims 5 and 6:

The mouthpiece interface is oriented with respect to the housing such that the mouthpiece extends outward from the housing back edge when the mouthpiece is coupled to the housing (Fig. 2 of Mault). The mouthpiece extends obliquely (design choice MPEP 2144) from the top surface and substantially parallel to the top surface (Figs. 21 and 24 of Mault).

In reference to claims 8 and 10:

An actuator (16 of Mault) is used for controlling illumination of a portion of the housing. A light source illuminates at least a portion of the interface, where the housing has an opening for light to pass from an interior of the housing to an exterior of the housing for illuminating at least a portion of the interface (Col. 3, line 59- Col. 4, line 5 of Mault).

20. Claim 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over Mault in view of Sheehan as applied to claim 1 above and further in view of US 5,291,898 to Wolf (Hereinafter "Wolf").

In reference to claim 11:

Mault and Sheehan teach all of the claim limitations; See the rejection of claim 1 above.

However, Mault and Sheehan fail to teach that:

The housing comprises a mouthpiece ejector for facilitating removal of the mouthpiece from the housing.

Wolf teaches:

A hand held device for measuring breath alcohol, which comprises an ejector (120 of Wolf) for ejecting the mouthpiece forceably, so that the mouthpiece is ejected into a refuse container or onto the

ground without the need of the officer administering the test to touch the used mouthpiece (Col. 9, lines 9-17 of Wolf).

Therefore it would have been obvious to one having ordinary skill in the art at the time the applicant's invention was made to have added an ejector, similar to the one taught by Wolf, in the calorimeter level measurement device of Mault as modified by Sheehan, in order to prevent the operator to touch the used mouthpiece after it has been used by the subject.

21. Claims 25 and 43 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mault in view of Sheehan.

In reference to claims 25 and 43:

Mault teaches all of the claim limitations; see the rejection of claim 23 and 36 above.

However Mault fails to teach that:

The manual sample button located on an edge of the housing base that is opposite an edge where the display is located.

Sheehan teaches:

A portable data collection device for diagnosing and data collection (Abstract of Sheehan), comprising actuator buttons placed on the same (216 of Sheehan) or opposite (218 of Sheehan) side of the

display (220 of Sheehan). The input dials (216 and 218 of Sheehan), control the operation of the device.

Therefore it would have been obvious to one having ordinary skill in the art at the time the applicant's invention was made to have placed the operating actuator buttons on the gripping handle of the device, similar to the teachings of Sheehan, in the Calorimeter of Mault, in order to give the subject more convenient, while operating the device.

22. Claim 33 is rejected under 35 U.S.C. 103(a) as being unpatentable over Mault in view of Wolf.

In reference to claim 33:

Mault teaches all of the claim limitations; see the rejection of claim 23 above.

However, Mault fails to teach that:

The housing comprises a mouthpiece ejector for facilitating removal of the mouthpiece from the housing.

Wolf teaches:

A hand held device for measuring breath alcohol, which comprises an ejector (120 of Wolf) for ejecting the mouthpiece forceably, so that the mouthpiece is ejected into a refuse container or onto the

ground without the need of the officer administering the test to touch the used mouthpiece (Col. 9, lines 9-17 of Wolf).

Therefore it would have been obvious to one having ordinary skill in the art at the time the applicant's invention was made to have added an ejector, similar to the one taught by Wolf, in the calorimeter level measurement device of Mault, in order to prevent the operator to touch the used mouthpiece after it has been used by the subject.

23. Claims 35, 46 and 49 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mault in view of Lutz.

In reference to claims 35 and 46:

Mault teaches all of the claim limitations; see the rejections of claims 23 and 36 above.

However, Mault fails to teach that:

The first end of the mouthpiece body is closed and an opposed second end of the body is open to enable a subject being tested to blow air into the body. The body further comprises at least one port for blown air to pass through the port. The first end has a semi-circular cross-sectional profile.

Lutz teaches:



A device for measuring redox gases, such as alcohol, in a person's breath, which comprises a disposable mouthpiece (Abstract of Lutz). The mouthpiece (5 of Lutz), comprises a second end (39 of Lutz) and a first end (27 of Lutz), with the second end is closed and is rounded to facilitate engagement with the breath testing device (Fig. 1 of Lutz). The mouthpiece has a substantially semi-circular (the cross-section at 27 of Lutz).

Therefore it would have been obvious to one having ordinary skill in the art at the time the applicant's invention was made to have substituted the mouthpiece of the metabolic calorimeter of Mault with a mouthpiece similar to the one taught by Lutz, in order to test the breath gases of a subject. The substitution of one known element in the art with another would have yielded predictable results.

In reference to claim 49:

The body further comprises an external surface (The outside surface of mouthpiece 5 of Lutz), an internal surface (inside surface of mouthpiece 5 of Lutz), and at least one outlet port (39 and 15 of Lutz) extending therebetween, where the outlet port channels discard breath air from the mouthpiece during testing.

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24. Claims 54-55 and 57-60 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mault in view of US 4,202,353 to Hirsch et al (Hereinafter "Hirsch").

In reference to claims 54-55 and 57- 60:

Mault teaches:

A calorimeter for measuring the metabolic rate of a subject, which comprises a mouthpiece (14 or 20). The mouthpiece comprises a first end (seal 354), a second end (the end attached to 346), and a body extending there between (344). A portion of the body has a selected cross-sectional shape being one of a D-shaped cross-sectional shape and a V-shaped cross-sectional shape (Fig. 23 the difference between the v-shape and d-shape cross sectional shape of the mouthpiece does not add patentable weight to the claimed invention, and it's merely a design choice, MPEP 2144). The body further comprises a passageway extending through the body from the first end towards the second end (Fig. 24), where the passageway channels the air blown into the mouthpiece into the breath testing device (Fig. 4). The port is defined within the second body portion for channeling air blown into the first end into the breath testing device during testing (inlet port 30). One of the first end and the second end is rounded to facilitate engagement with the breath testing device (the connection 346 to the second end of

the mouthpiece). One of the first body portion and the second body portion has a substantially semi-circular cross-sectional shape (Fig. 24).

However, Mault fails to teach that:

One port is defined within the first body portion for channeling discard breath air from the mouthpiece during testing, and it is oriented with respect to the mouthpiece such that discard breath is not directed towards an operator of the breath testing device during testing. The second end of the mouthpiece is closed, while the first end is open to enable a subject being tested to blow air into the mouthpiece.

Hirsch teaches:

A temperature and respiration sensing probe which comprises an inlet port (20 and 24 of Hirsch) and an outlet port (26 of Hirsch). The outlet port channels the discarded breath air from the mouthpiece during testing, and it is oriented with respect to the mouthpiece such that discard breath is not directed at an operator of the breath testing device during testing (Fig. 3).

It would have been obvious to one having ordinary skill in the art at the time the applicant's invention was made to have replaced the mouthpiece of the calorimeter of Maul with a mouthpiece similar to the one taught by

Hirsch, in order to test the breaths of a subject. Replacing one known mouthpiece in the art for another would have yielded predictable result.

### ***Double Patenting***

25. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

26. Claims 13, 15-16, 23-27, 47-55 and 57-61 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-7 and 11-29 of copending Application No. 11/089655. Although the conflicting claims are not identical, they are not patentably distinct from each other because both co-pending applications are drawn to a breathalyzer, comprising a housing and a mouthpiece, with the same features claimed in the aforementioned claims above.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

### ***Conclusion***

27. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Anita Saidi whose telephone number is (571)270-3001. The examiner can normally be reached on Monday-Friday 9:30 am - 6:00 pm Est..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Charles Marmor, II can be reached on 571-272-4730. The fax phone

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number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Charles A. Marmor, II/  
Supervisory Patent Examiner  
Art Unit 3735

/A. S./  
Examiner, Art Unit 3735  
1/10/2008